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IN THE

Supreme Court of the United States

October Term, 1930.

No. 678.

Smoot Sand and Gravel Corporation, *Petitioner,*

vs.

Washington Airport, Incorporated, *Respondent.*

Motion of the Commonwealth of Virginia for Leave to File Brief as Amicus Curiæ and Brief of Amicus Curiæ.

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SMOOT SAND AND GRAVEL CORPORATION, *Petitioner,*

vs.

WASHINGTON AIRPORT, INCORPORATED, *Respondent.*

Motion for Leave to File Brief as Amicus Curiæ.

May it please the Court:

The undersigned, as counsel for the Commonwealth of Virginia, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiæ.*

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Brief of Amicus Curiæ.

PRELIMINARY STATEMENT.

The sole question presented in this case is whether the lands lying between high and low water marks on the south side of the Potomac River opposite the District of Columbia are within Virginia or the District of Columbia. The interest of the Commonwealth of Virginia is, therefore, obvious as its own boundary line is involved, together with its right to levy taxes, exercise police jurisdiction and in general exercise its rights of sovereignty within the disputed area.

1.

ORIGINAL BOUNDARY.

From old records, the first royal grant affecting the boundary dispute between Virginia and Maryland is that of May 23, 1609, by which King James of England granted to the Colony of Virginia "All the territory from the point of land called Cape or Point Comfort, all along the seacoast to the Northward two hundred miles." This grant would have embraced all of Maryland and a portion of the territory now within the State of Pennsylvania and would have included the entire width of the Potomac river.

The second grant was that of June 20, 1632, by which Charles I, the son and successor of James, conveyed to Cecilius Calvert the territory embraced in the present State of Maryland, in which the southern boundary is described as "To the farther bank of said river (Potomac) and following it." This grant constituted an overlap. There is no record that the grant to Virginia had been judicially abrogated and, if not, the grant to Virginia, prior in time, should have taken precedence, and the claim of Virginia to all of the territory contained in the grant of James I should have been recognized.

On January 27, 1660, James II granted to Lord Culpeper the territory lying to the south of the Potomac river, now known as the Northern Neck of Virginia. In this grant he included "the Potomac River and all the islands within the outermost banks thereof." This made a second overlap, but only as to the Potomac river, provided, of course, that the King Charles grant conveyed a right to the south shore or, as was afterwards claimed,

to high water mark on the south bank of the Potomac.

These conflicting grants were the cause of claim and counter-claim as to the ownership of the Potomac. Not having been settled previous to the Revolution, Virginia in its Constitution of 1776 receded from its claims to large portions of the territories of Maryland and Pennsylvania, ceded and released all of its claims of property, jurisdiction and government to lands included in those States, but expressly excepted from this renunciation the navigation and use of the Potomac and Pokomoke rivers and the territory of the Virginia *shores* and *strands* bordering on those rivers and all improvements which have been or shall be made thereon. That constitution further provided:—"The western and northern extent of Virginia shall in all other respects stand as fixed by the charter of James the first, in the year one thousand six hundred and nine." * * *. Its Code made the same provisions. It will be noted that in both of these solemn public instruments provision was made for the exception of the operation of Virginia's renuniciation of rights in those territories as to property of the Virginia shore or strands bordering on either of the rivers.

It is undisputed that shores or strands mean the land between low tide and high tide.

Thus, it will be seen that in 1776 Virginia in its Constitution and again in its Code claimed the property of the Virginia shore or strands bordering upon the Potomac river. We are unable to trace the history of the controversy as to the Potomac between Virginia and Maryland during the trying period of the Revolution. However, nine years after Virginia had solemnly reasserted her claim, she and Maryland entered into what all the

courts call a Compact. This Compact of 1785 settled many of the points in controversy between the two States. For the purpose of our argument, we only refer to sections 6 and 7 of this Compact. Section 6 provided as to the navigation of the Potomac, while section 7 provided for property rights of each State on the shores of the Potomac, giving to the citizens of each State full property rights in the shores of that river adjoining their lands with all emoluments and advantages thereto belonging and the privileges of making and carrying out wharves and other improvements. It will be noticed that section 7 speaks three times of shores, the first time speaking of the shores of the Potomac river, and on the other two occasions speaking of the shores of the other *State* and providing that the citizens of neither State shall have a right to fish with nets or seines on the shores of the other State. If the language used means anything, it means that each State owns the adjoining shore on the Potomac river and that the citizens of the other have only limited rights and privileges in those shores. The privilege or right is expressly given to fish in all of the waters and necessarily includes waters covering shores at high tide, but this right of fishing is limited. The right of the citizens of either of the States to fish upon the shore of the other State must be exercised with due regard to the rights of the citizens of that other State and may not be done to the hindrance or disturbance of the fisheries on the shores of the other State. Neither can citizens of one State fish with nets or seines on the shores of the other State. To what possible right could this provision apply other than the land between high water mark and low water mark—the *shore?*

To construe the Compact as intended to acknowledge the right of Maryland to the southern shore of the Potomac while allowing citizens of Maryland unlimited right to fish in the waters of the Potomac with hook and line, and refusing them the right to fish with nets or seines, would have been a most remarkable provision discriminating against the citizens of Maryland, the owner of the shore, in favor of citizens of Virginia, whose citizens would have the right to fish with net and seine on the Virginia shore. Put just a little differently, Maryland and Virginia agreed that Maryland owned a strip of land adjoining the Virginia mainland, between high water mark and low water mark, and at the same time agreed to allow citizens of Virginia unrestricted fishing rights in that strip of Maryland territory, while restricting the rights of the citizens of the owner State. Fishing with hook and line or any other manner of fishing except with nets and seines, Maryland fishermen would ordinarily be using the *waters* of the river without interfering with, going upon, or in any way making use of the land on the Virginia shore, while, if fishermen pursued their calling by fishing with net or seine, they must make physical contact with and use of the land constituting the Virginia shore.

With due regard to ill considered dictum and opinions in cases to which we will hereafter refer, and some of which we will attempt to analyze, it is respectfully submitted that this Compact solemnly entered into by the States of Maryland and Virginia in 1785, six years previous to the cession by these States of territory to the United States, definitely, positively, unqualifiedly and unambiguously settled the rights of each State to its own shores and the rights of citizens of each State to

certain qualified and restricted privileges in the shores of the other State.

A number of cases refer to the boundary of Virginia having been settled by the award of the arbitrators appointed by Maryland and Virginia to settle Potomac river boundary disputes, the award of the arbitrators having been returned January 16, 1877. It is our contention that the boundary was settled by the Compact. The question still at issue was the actual running of the line. Even though there is no question as to the proprietary rights or the fact that the principle by which the line is to be run has been definitely settled, it is not without considerable difficulty that the actual boundary is run and marked upon land. The settlement of the Compact definitely determined where the actual boundary should be run and marked. It could have but little practical effect until a survey was made and the land marked.

Reference is had in a number of cases to the fact that the boundary was not established by the Compact, but that the definite settlement was made later by commissioners appointed by the States of Maryland and Virginia. The commissioners were appointed pursuant to Acts of the General Assemblies of Maryland and Virginia. By the General Assembly of Virginia appointing commissioners, it is declared that the compact theretofore entered into by Maryland and Virginia was to remain obligatory except as it might have been superseded by the provisions of the Constitution of the United States, and it provided that the pact should be faithfully observed and kept by the government of Virginia and all of its citizens, and recited several articles of the Compact, including the seventh article, in which as we have already set forth, the rights of the respective

States to the shores of each State or adjoining each State were acknowledged by each State as the property of the other. So that it will be seen that the very instrument creating the commission to actually locate the boundary between Maryland and Virginia referred to and expressly provided for the maintenance of the original Compact between those States. Under such authority the commissioners or arbitrators were restricted to an observance of the Compact and, the Compact having provided the respective rights of the States in the shores and strands, the commissioners were not authorized to make changes in the Compact, but were only to make a physical survey and mark the boundary line.

Section 14 of the Code of Virginia contains the provisions under which the commission was appointed and it will be noted from a reading of the report of the commissioners that they executed the authority vested in them by having a survey made of the boundary and returning with their report the courses, distances, metes and bounds of this survey. In their report they referred to the fact that measurements were taken and places fixed according to the coast survey and that they had come as near to perfect mathematical accuracy as in the nature of things was possible, and, further, they referred to the fact that the low water mark on the Potomac to which Virginia "has a right to the soil" is to be measured "from low water mark at one head land to low water mark at another without following indentations, bays, creeks, inlets or affluent rivers."

At the date of this report not one of the cases cited by and upon which the appellee relies had been decided and, therefore, the commissioners did not have in mind the many interesting legal questions the courts have since

considered, and, even though Maryland was then claiming the Virginia shores of the Potomac, the commissioners evidently concluded that Virginia was entitled, under the Compact of 1785, to the soil to low water mark on the Potomac. This they agreed had been decided by the two States in 1785. It has been held that the Compact of 1785 did not fix the boundary between the States. If by this is meant that an actual line was not run on the ground, land marks established, trees chopped, stone planted, a plat made with the surveyor's metes and bounds, courses and distances, then we agree no boundary was fixed by the Compact of 1785. If all this is necessary to the establishment of a boundary line, then what, pray, comes of Maryland's boundary line as fixed in King Charles' grant? The Compact fixes the southern boundary of Maryland at low water mark on the Virginia shore of the Potomac. The Maryland grant fixes the southern boundary as the "farther bank of said river (Potomac) and following it." It is said, and *Marine Railway* v. *United States* is quoted, that the Supreme Court of the United States has held that the Compact of 1785 "says nothing about the boundary in terms," although it seems to be generally admitted that the *Maryland Case* held the Compact fixed the boundary at "low water mark." "Low water mark" is fixed in the Compact as some kind of line, for some purpose, in the boundary dispute between Maryland and Virginia. Ordinarily and stript of legal technicalities, the low water mark fixation in the Compact would definitely fix the southern boundary of Maryland and the northern boundary of Virginia at low water mark of the Potomac on the Virginia shore. And if the "reason of the law is the

life of the law," courts should so hold. However this may be, we submit that the language used by King Charles, "To the farther bank of said river (Potomac) and following it" is no more definite and no more fixes Maryland's boundary than the language of the Compact fixing her boundary at "low water mark" on the Virginia shore.

At the time the Virginia-Maryland Compact of 1785 was entered into Maryland and Virginia were soverign States, with full authority to make and enter into boundary line agreements.

It was after the Compact had been entered into on July 16, 1790, that Congress passed an act accepting the territory Maryland and Virginia had offered to cede to the United States, and it was only in 1791 that commissioners were appointed and the ten square miles of territory selected. In the Acts passed by the Maryland and Virginia Legislatures ceding the territory to the United States, it was provided that the United States were not to have any right or property in the soil transferred so as to affect the rights of individuals otherwise than such as were transferred by individual owners to the United States.

On July 9, 1846, Congress passed an act returning to Virginia the land formerly ceded by Virginia to the United States. In the act it was provided that all of the rights and jurisdictions theretofore ceded were ceded and forever relinquished to the State of Virginia in full and absolute right and jurisdiction as well of *soil* as of persons residing thereon. This act of recession gave back to Virginia all that she had given to the Federal government and necessarily included the shores as well as the main land.

2.

BOUNDARY AFFECTED BY COURT DECISIONS.

MORRIS v. UNITED STATES, 174 U. S. 196.

The purpose of the cession of land by Maryland and Virginia to the United States was the establishment of the Federal Capital. By virtue of the cessions by Maryland and Virginia a territory was provided. However, the ownership of the land upon which the city was to be built belonged to private individuals. The government must acquire ownership of the land for its public buildings, for the streets of the proposed city, its parks and playgrounds. Individual owners, by separate conveyances, conveyed or agreed to convey this land in trust upon certain terms and conditions. It was proposed to lay out a Federal city; the streets were to be provided free by the land-owners. A very voluminous description of the process by which the city of Washington was laid out is contained in the *Morris Case*. In the plan of the city, among other streets, Water street was laid out along the shores of the Potomac river. The land on the north was surveyed off into lots, each alternative one of which, or one out of each two of which, was to be sold for the purpose of raising money to finance the public buildings. Each alternative lot was to belong to the land-owner. The land had been acquired from a number of individuals, consequently, the ownership of the lands north of Water street was in different persons. The heirs of John Marshall and of James Markham Marshall claimed certain rights in the shores adjoining the Poto-

mac river, as did a number of parties owning lands north of Water street. In this condition, Congress passed an act authorizing the Attorney General to institute a suit in the Supreme Court of the District of Columbia against all persons claiming any right, title or interest in the land or water in the District of Columbia "within the *limits of the city of Washington or exterior to said limits and in front thereof toward the channel of the Potomac river* * * * for the purpose of establishing and making clear the right of the United States thereto." (Italics ours.) This act expressly limited the court's jurisdiction to the Maryland shore of the District. The claims of the heirs of John Marshall were based upon the ownership of the entire bed of the Potomac river under the James II grant to Lord Culpeper. The James M. Marshall heirs claimed both under the Culpeper grant and the grant of Charles I to Cecilius Calvert. Thus the James M. Marshall heirs' claims were based upon conflicting grants.

Practically all of the other claims asserted were those of riparian rights in the shores of the Potomac in the city of Washington or exterior to said limits, but in front thereof under the Calvert grants.

It will be noted that all of the lands involved in the Morris suit litigation were on the north or Maryland side of the Potomac river. Maryland had ceded this territory to the United States and was no longer interested in the outcome of the litigation. Only the heirs of John Marshall claimed an interest under the Virginia grant and, as Virginia had by its Compact of 1785 with Maryland relinquished its claims to the Maryland shore of the Potomac, she was no longer interested in the outcome of the litigation. Apparently, none of her rights

could by any possibility be affected by the outcome of the litigation.

In this view of the situation involved in the *Morris Case*, we may be mistaken if, as is now claimed, the rights of Virginia have been judicially determined by the dictum of Judge Shiras in that case. There was certainly no necessity for a decision of the Virginia boundary, whether at high or low water mark. The only possible way in which the Virginia boundary could have been remarked upon was because of the fact that the heirs of John Marshall were claiming under the James II grant. The application of that grant only had to do with claims of the Marshall heirs to the Maryland shore in the new city of Washington. Page after page of the *Morris Case* opinion is devoted to the manner in which the United States acquired the Washington city property. The court was of the opinion, and we find no fault with its conclusions, first, that a sovereign State ordinarily owns navigable shores, and, second, that the contract entered into by the riparian proprietors of the Washington city shore conveyed all right, interest and title, including their riparian rights, to the United States; nor do we find fault with the reasoning of the court in its conclusion that the Federal government, after having acquired the entire interest of the landed proprietors, established the city of Washington, its public building sites, its streets and, by necessary implication, retained rights to the shores of the Potomac within the city boundary.

The court also held that there was no evidence that the State of Maryland had ever in any way exercised its right to convey the shore lands to individual proprietors, thus, by implication, holding that the State still held its shore rights at the time it ceded land to the Federal gov-

ernment and that, because of this fact, the title to the Potomac shores within the District of Columbia was the property not of individuals but of the government.

And while practically the same was held (*obiter dictum*) as to the Virginia shores, the court was mistaken as to Virginia legislation, the State having as far back as 1697 passed an act found in 2 Henning's Statutes 456, in which it was provided that every man's right, by virtue of his patent, extended as far as low water mark and that such right was a privilege granted to him by his patent and that no person could go and fish upon his shores above low water mark.

MARINE RAILWAY AND COAL COMPANY v. UNITED STATES, 257 U. S. 47.

In this case the matter in controversy was made land in the Potomac river below low water mark on the Virginia side. While the Court of Appeals of the District of Columbia in the *Evans Case*, 31 Dist. App. 544, holds that the 1785 Compact between Maryland and Virginia was never in force in the District of Columbia, the *Herald Case*, 284 Fed. 927, holds that this same Compact was abrogated by the cession by Virginia of that portion of Virginia which was included in the District of Columbia and that rights which would otherwise have been held by Virginia and its citizens in the Virginia part of the District of Columbia, so far as the Potomac river is concerned, were retained by Congress for the benefit of the District of Columbia upon a recession to Virginia of its contribution to the District of Columbia.

In the *Marine Railway Case* 265 Fed. 437, the Court of Appeals of the District of Columbia recognized the

1785 Compact, quoting section 6 and a part of section 7 thereof and construing the subject matter of the agreement as that of use and jurisdiction and not of sovereignty, and further held that the jurisdiction of the United States within the District of Columbia extends over the Potomac river to high water mark on the Virginia shore. Just how that conclusion is reached, we are unable to understand, in connection with the language of the act of Congress of July 9, 1846, in which it is provided:

> "All of that portion of the District of Columbia ceded to the United States by the State of Virginia and all the *rights* and jurisdiction therewith ceded over the same be and the same are hereby ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction as well of soil as of persons residing or to reside thereon." (Italics supplied.)

The *Evans Case* holds that the recession of Virginia did not apply to the rights of the State or individuals originally settled by the Compact of 1785, because of the fact that the District of Columbia was no party to the settlement between Maryland and Virginia, and, even if it was, that the recession was only of the landed territory of Virginia extending to high water mark in the Potomac river, while the same court and the same justice accepted the Compact in the *Herald Case,* but limited its effect to the use and jurisdiction of the Potomac and to no part of its sovereignty.

The trouble with the opinions of the court of the District of Columbia lies in their apparent failure to take into consideration that part of section 7 of the Compact

which has to do with the Virginia shores of the Potomac. Not only does section 7 give the citizens of Virginia full property in the shores of the Potomac adjoining their lands, but it gives to them all emoluments and advantages and the privileges of building wharves out into the river, and we ask the court to note the language employed in one part giving to citizens of each State property in the shores of the river and in another part giving to such property owners the emoluments and advantages belonging to them as proprietors of such shores with the privilege of building wharves and other improvements within the river itself. The further language used, to the effect that the building of wharves and other improvements in the river is not to obstruct navigation, clearly indicates that the building of these wharves and improvements is not to be confined to shallow water, but to extend out into the river, the only restriction being that such wharves or improvements are not to obstruct the navigation of the river. This same provision which had given the owners of lands adjoining the Potomac full property in the shores of that river may have been construed as a provision limited to individuals and not as applying to the sovereignty of the States, but when we consider that the same section provides that the citizens of neither State shall have a right to fish with nets or seines *on the shores of the other,* it clearly indicates that each of the soverign States recognized the sovereign right of the other to the shores of the Potomac river bordering on that State. In no other possible way can the language of section 7 be reasonably construed.

In the *Evans Case,* Justice Orsdel was of the opinion that the holding in cases cited by him as to the jurisdic-

tion of the District of Columbia on the Virginia side of the Potomac was in no small degree grounded upon the theory that Congress had politically determined the territorial limits of the District of Columbia, and cites an act of Congress approved June 22, 1874, in which the District of Columbia is defined to be "that portion of the territory of the United States ceded by the State of Maryland for the permanent seat of government of the United States including the river Potomac in its course through the District and the islands therein." He says it thus appears that Congress fixed the boundary of the District at high water mark on the Virginia side and that, as this was a political determination of the territorial limits, it is binding upon the courts of the District of Columbia, and quotes from *State* v. *Dunwell,* 3 R. I. 127-128.

The political determination of the *Dunwell Case* applied to the enforcement of the criminal laws of the State enacting such laws within the boundaries as established by the law making authority of the State. By no possibility could the Rhode Island court, or the District of Columbia court, have established the boundary line between the District and Virginia.

In *Rhode Island* v. *Massachusetts,* the jurisdiction of the United States Supreme Court was challenged by Massachusetts on the ground that the boundary dispute between the States was a political and not a judicial question. The court in that case held the question to be judicial and not political. In its opinion, the court did say that prior to the adoption of the Constitution and the establishment of the Supreme Court, the question of boundary between States was political; that after the

adoption of the Constitution they could not by compact determine their boundaries without the consent of Congress, and that where the States failed to agree, the Supreme Court had jurisdiction.

Rhode Island and Massachusetts having agreed by compact, "the construction of such compact is a judicial question, and was so considered by this court in the *Lessee of Sims* v. *Irvine* (3 Dall. 425-454); *Marlatt* v. *Silk and M'Donald* (11 Peters 2, 18); *Barton* v. *Williams,* (3 Wheat, 529-533, and so forth)."

In the *Marlatt Case,* in which the priority of grants to individuals from the States of Pennsylvania and Virginia was in issue, cases from the Supreme Courts of both States were cited. The United States Supreme Court held: "It was laid down in reference to cases arising under, and to be decided by the laws of a State, and then the decisions of that State are looked to to ascertain what that law is; whereas, in the case at bar, the question arises under, and is to be decided by a compact between two States where, therefore, the rule of decision is not to be collected from the decisions of either State, but is one, if we may so speak, of an international character. (11 Peters, 22-23)."

The Supreme Court refused to follow the decision of the Virginia Court in a suit wherein the subject at issue was the application of the Virginia and Pennsylvania compact of 1780, to land grants issued by Virginia in 1779 for lands found by the compact to be within the boundary of the State of Pennsylvania.

The Supreme Court of the United States has repeatedly asserted its jurisdiction in fixing boundary lines between States. *Rhode Island* v. *Massachusetts,* 12

Peters 654; *Virginia* v. *Tennessee,* 148 U. S. 528. *Maryland* v. *West Virginia,* 217 U. S. 577, is one of these cases, and it is noted that the opinion of the court in that case held that the boundary between the States of Maryland and Virginia was fixed at the low water mark on the Virginia shore by the Compact of 1785.

The justice in the *Marine Railway Case,* 265 Fed. 437, 442, says:

> "* * * By the compact of 1785 concurrent jurisdiction on the waters of the Potomac was established between the two sovereignties of Maryland and Virginia. Such compacts are common in this country over the waters of navigable streams. But as to the bed of the river the jurisdiction in the sovereignty to which it belongs is not thereby affected. * * *"

EVANS V. UNITED STATES, 31 D. C. APP. 544;
HERALD V. UNITED STATES, 284 FED. 927.

In these cases appellants were convicted of having, while standing on the Virginia shore, fished in the Potomac river between high tide and low tide. The opinions in both cases in the Court of Appeals of the District of Columbia were delievered by Mr. Justice Van Orsdel, in which he held that the Compact of 1785 between Maryland and Virginia did not apply to the District of Columbia in view of the cessions of land by Virginia and Maryland to the United States and the limited recession of Virginia's contribution to the District of Columbia back to the State of Virginia. The District Court held that, under the grant of Charles I. to Cecilius Calvert, Maryland took to the high water mark on the Virginia

shore, and that, under the law relating to land under navigable waters, the sovereignty of title in the land passed, and that Calvert owned all of the land under the Potomac river including the shores on both sides of the river. Just how this opinion was arrived at is not apparent from the authorities. The original James I. grant had established the southern boundary of Virginia at Cape or Point Comfort and extended it northward two hundred miles. Undoubtedly, the Colony of Virginia would by that grant have extended beyond the Potomac and beyond even the northern boundary of Maryland into the State of Pennsylvania. The grant to Calvert undoubtedly overlapped the grant to Virginia and for a considerable period of time and until Virginia's Constitution of 1776 was adopted the Colony never formally recognized the territorial validity of the Charles I. grant to Calvert so far as it overlapped the James I. grant to Virginia of a territory extending from Cape or Point Comfort two hundred miles northward. The cases undoubtedly ignore the James I. grant and give effect to the Charles I. grant. There is as much apparent reason in law to give effect to the James I. grant and declare it of binding force and effect as there is to give prior effect to the Calvert grant over the James II. grant conveying the Northern Neck of Virginia, including the Potomac river opposite the District of Columbia, to Lord Culpeper. But the courts in the *Evans* and *Herald Cases* have absolutely ignored the grant to James I. and given full effect to that of Charles I. so far as the southern boundary of Maryland was concerned.

In the *Evans Case* the court admitted that citizens of Virginia had certain easements and privileges in the

Potomac river within the boundary of the District of Columbia, under the Compact of 1785, but that those rights were such as were lost by the cession of the land to which they were appurtenant and that, when the Virginia portion of the District was receded, the rights appertaining to citizens owning the Virginia shores of the Potomac were retained by the District.

Maryland v. West Virginia.

This case is cited, analyzed and quoted in the briefs of both appellant and appellee. The issue in the original bill was the western boundary of Maryland. Suit was instituted by Maryland against West Virginia in the Supreme Court of the United States to settle their boundary disputes. It was admitted that the western boundary of Maryland began at the head waters of the Potomac and ran north to the State of Pennsylvania. The States differed as to just where was located the head waters of the Potomac, and the difficulty was to find this location. A line—the Deakins line—had been run by a surveyor of that name in 1787. Deakins established the head waters of the Potomac at Fairfax Stone. This location was not acceptable to Maryland and she and Virginia had been in constant controversy as to this boundary for three-quarters of a century when in 1859 Michener ran a line for Maryland, in which he located the head waters of the Potomac at Potomac Stone, a point west of Fairfax Stone. This left in dispute between Maryland and Virginia the territory between Fairfax Stone and Potomac Stone. The two States not having been able to agree upon a settlement, suit was instituted by Maryland against West Virginia—successor in

title to Virginia—in the Supreme Court of the United States in 1891, in which Maryland asked that her boundary be established, and set up her claim to the territory between the Deakins line and the Michener line. West Virginia, answering the bill in that suit, claimed the territory between these two lines and, in a cross-bill, asked to have what we may call the water boundary between the States established, claiming to the north bank of the Potomac above Harper's Ferry to the Fairfax Stone as the true boundary between the States.

Two opinions were delivered, 217 U. S. 1 and 217 U. S. 577, Justice Day delivering both. In the first decision the court held:

First, that the West Virginia-Maryland boundary began at Fairfax Stone, thus finding in favor of West Virginia:

Second, that the West Virginia-Maryland water boundary was not at high water mark on the north bank of the Potomac, thus finding against West Virginia.

While the finding was against West Virginia upon its claim to the north bank of the Potomac, it did not determine the true boundary between the States, thus it did not undertake to fix the boundary, but left that unsettled.

In the opinion in the first case, Justic Day quoted at some length from Justice Shiras' opinion in the *Morris Case,* and to that extent it may be said that he agreed with the finding in the *Morris Case* and approved the opinion of the court. However, when counsel had prepared decrees, it was found that they differed in their construction of the court's determination, and the issue of the water boundary between Maryland and West Virginia was squarely put in issue before a court of

competent jurisdiction where both parties in interest were before the court.

In the *Morris Case* the issue was not as to the true boundary between the District of Columbia and Virginia, but between the District of Columbia and John Marshall's heirs who claimed the shores of the north bank of the Potomac, the south bank not only not being at issue, but being outside of the jurisdiction of the court in that case, the court at the time acting under express authority of an act of Congress which limited the jurisdiction of the court to claims in the city of Washington and exterior to the limits of the city toward the channel of the Potomac river. Acting under limited authority, and the boundary between the District of Columbia and Virginia not being at issue, the opinion of the court that the southern boundary of Maryland was at high water mark on the Virginia shore of the Potomac was *obiter dictum* in its most extreme form and superlative degree. And, as it is largely upon the authority of this dictum that the *Evans* and the *Herald Cases* were decided, we submit that this court should not feel itself called upon to follow those cases.

The issue in the *Marine Railway Case* was the ownership of made land on the Virginia side of the Potomac below low water mark, so that the boundary was not in issue in that case.

In the *Evans* and *Herald* criminal cases the political jurisdiction and police power of the District were in direct issue, the boundary incidentally and largely immaterial.

Without, in so many words, overruling the *Morris Case*, the *Maryland Case* did so in effect as to the bound-

ary dictum, most likely for the reason that it did not consider the *Morris Case* authority upon the boundary line dispute nor based upon a careful consideration of the Compact of 1785 between the States of Maryland and Virginia.

There are quite a few reasons advanced why the ruling of the *Maryland Case* is inapplicable in this case.

First, the decision was handed down after both Maryland and Virginia had ceded territory to the United States, and the District of Columbia, not being a party, was not bound.

We agree that the District was not a party and is not bound on an issue *res adjudicata*. This reply to the citation of the case as authority to the effect that the Supreme Court has fixed the northern boundary of Virginia at low water mark on the Potomac in a case subsequent to the *Morris Case*, in which that case, to the extent that it fixed a different boundary, overruled the dictum in the *Morris Case*, is most humorous when considered in connection with the impressive, persistent and insistent claim that the *Morris Case* and the *Fish Cases*, to which Virginia was not a party, shall be accepted as a final determination of Virginia's rights.

Second, it is insisted that the last decision in the *Maryland Case* was based upon the report and award of boundary dispute commissioners in 1877, or after the District became a separate sovereignty and, being based upon facts inapplicable, is not even persuasive authority.

On page 5 of appellee's brief, the report of these same commissioners is stated as authority of the conclusive fact that, under the Charles I. grant, the southern boundary of Maryland, was at high water mark on the Virginia shore. Presumably, a most wise commission and a

criticism-proof conclusion. When, further on, the same commission finds that it was established that Virginia, from the earliest period of her history, used the south bank of the Potomac as if the soil to low water mark had been her own, that she did not give up her rights and that, taken altogether, it was established that she had a proprietary right to low water mark on her side to such an extent as to make her claim indisputable, counsel argue that the commission's findings of the facts as they existed in 1785 are erroneous and that no such facts did exist. It is also argued that the court, in the *Maryland Case,* did not fix the boundary, but simply recited the conclusion of the commission and that, even if it did undertake to fix it, it had no right to fix it above Tidewater and, therefore, it is not good authority.

The opinion of the court did quote from the report of the commission. However, the court arrived at its own conclusion, in which it expressly fixed the boundary line, and, as the holding of the court seems to be in dispute, we will quote therefrom at some length (217 U. S. 580):

> "The compact of 1785 (see Code of Virginia, vol. I, title 3, chap. 3, sec. 13, p. 16) is set up in this case, and its binding force is preserved in the draft of the decrees submitted by counsel for both States. We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac river shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective States in the compact of 1785, and its subsequent

ratifications, indicate the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river.

"This conclusion gives to Maryland a uniform southern boundary along Virginia and West Virginia, at low-water mark on the south bank of the Potomac to the intersection of the north and south line between Maryland and West Virginia, established by the decree in this case. This conclusion is also consistent with the previous exercise of political jurisdiction by the States respectively.

"The decree will therefore provide for the south bank of the Potomac river at low-water mark on the West Virginia shore as the true southern boundary line of the State of Maryland."

It is conceded in the opinion in the *Marine Railway Case* in the lower court that the court in the *Maryland Case* held, in effect, that the Compact of 1785 established the boundary line at low water mark on the Virginia shore. The opinion then holds that, unless affected by the exercise of political jurisdiction by the United States, it likewise fixed the boundary of the District of Columbia as ceded by Maryland in 1779, and that whatever territory and right to the soil under the Potomac was ceded to the United States in 1779 by Virginia was receded in 1846. This would seem to have been the opinion of the court in the *Marine Railway Case,* though doubt is thrown upon this conclusion by the court's expression that the subject matter of the Compact was use and jurisdiction and not sovereignty.

We have heretofore discussed the construction of section 7 of the Compact as to this contention.

It is further held the holding in the cases cited, to sustain the claim of district sovereignty, was based in no

small degree upon the determination by Congress of the territorial limits of the district in which its limits were fixed, "including the river Potomac in its course through the District and the islands therein." It is submitted—

First, That the exercise of political sovereignty binds only those States exercising such rights and that the sovereign State of Virginia cannot have its territory taken away by the fiat of some other sovereignty without her consent. If so, Virginia could have acquired both shores of the Potomac by the adoption of her Constitution of 1776, in which instrument she expressly reserved her claims to the shores of that river.

Second, The act of Congress expressly limited the bounds of the District to the territory ceded by Maryland, and the language covering the islands and the Potomac river cannot be construed to enlarge or extend the boundary of the territory ceded.

In the opinion of the Supreme Court of the United States, by Justice Holmes, the court held that the original state of things (Maryland-Virginia boundary) was not changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side, and that the title of Maryland extended at least to low-water mark on the Virginia shore, and that the United States succeeded to the rights of Maryland as of the date of the grant. Both the *Maryland Case* and the *Morris Case* are cited by Justice Holmes as authority for the conclusions drawn in the latter part of the last statement of the findings of the Supreme Court. *Marine Railway Case, supra.*

Justice Holmes says the Compact of 1785 had nothing to do with the case the court was deciding. This we

grant, as it is just what we are contending. The court certainly recognized the riparian rights of citizen owners.

3.

RIGHTS—SERVITUDES—EASEMENTS.

Stress is laid on the fact that the rights of the State of Virginia and of its citizens to the shore of the Potomac river on Virginia's northern boundary line were ceded to the Federal government by that State in 1789. It is practically admitted that the *Maryland* v. *Virginia Case, supra,* as between Maryland and Virginia, fixed the southern boundary of Maryland at the low water mark on the Virginia shore. This decision theoretically fixes the boundary between the States of Maryland and Virginia. At least, it lays down the principle upon which the actual boundary line between the States is to be run. The only subsequent dispute between the States was the actual marking of the line upon the surface of the soil and, as said by the circuit court of appeals, the dispute continued for a considerable length of time and cannot yet be said to be definitely fixed on the ground.

Right much of the argument in brief of counsel for appellant is directed to the question of easements and servitudes. Appellant argues that the rights of Virginia and its citizens, as established by the Compact of 1785, gave to citizens of Virginia no more than an easement in the shores of the river, and that, by the cession to the United States by Virginia and Maryland of the territory comprising the District of Columbia, what may be called the shore rights of Virginia and its citizens

were granted to the Federal District and all shore rights of every kind and description were, by reason of these cessions of territory, absolutely and forever given up and relinquished.

This argument would apply as well to the shore rights of citizens of Maryland as to citizens of Virginia. This contention was not advanced, however, in the *Morris Case,* and it will be noted that the opinion of that case denies riparian rights to the shores on the District side to claimants thereof on account of the fact that such claimants had themselves conveyed their properties to the Federal government for the establishment of the city of Washington, and the city having laid out Water street along the Potomac river, it had thereby cut off the rights of claimants from the Potomac river.

Furthermore, we do not construe the recession of the Virginia territory by the United States as giving to Virginia and her citizens only rights to high water mark on the Virginia shore.

Congress ceded to Virginia all of the *rights* and *jurisdiction* which Virginia had ceded to the Federal government. It will be noticed that this cession particularly provides that the act was not to have the effect of transferring any right or property in the soil otherwise than such as was transferred by individual owners to the United States. By inference, on account of the fact that the *Morris Case* decided against claimants to riparian rights on the Maryland side, because of the fact that they had conveyed those rights away, the court held, if it did not expressly so hold, that the riparian rights of the District were derived by grants from individual owners.

If the District of Columbia did not acquire any of the rights of Virginia citizens by reason of the cession to the United States and individuals owned to low water mark by the provisions of Virginia law at the time of the Virginia cession to the United States, and Congress by its Act of 1846 receded the same rights, then the individual owners still have all such rights as they held at the date of the cession.

CONCLUSION.

The decisions of the courts are not consistent and, even when the results are the same, the reasons advanced are most inconsistent and variable. In the only case—*Maryland* v. *West Virginia*—was the boundary made a direct issue in the pleadings and in that case the court found that the Compact of 1785 fixed the southern boundary at low water mark on the Virginia shore of the Potomac. This case has not been overruled, though the *Marine Railway Case* has thrown what may be termed a suspicion on its findings.

As Virginia has never been a party to any of the cases and has always claimed and never abandoned her contention that the pact of 1785 finally fixed her boundary with Maryland, it is respectfully submitted that this court should definitely recognize the boundary of Virginia at low water mark of the Potomac on her northern shores.

Counsel notice that a brief in this case has been filed for the United States. It seems to have been filed as of right and not by leave of court, nor does the United States appear to have intervened as *amicus curiae*. How-

ever, counsel for Virginia are asking leave to file, if such leave is necessary, as *amicus curiae*.

Respectfully submitted upon behalf of the Commonwealth of Virginia.

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